

104 FERC ¶ 61,150  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

D.E. Shaw Plasma Power, L.L.C.

Docket No. EL03-128-000

DECLARATORY ORDER

(Issued July 28, 2003)

1. On May 28, 2003, D.E. Shaw Plasma Power, L.L.C. (Plasma Power), a company which intends to do business as a power marketer, filed a petition for a declaratory order disclaiming jurisdiction over its affiliate, D.E. Shaw & Co., L.P. (DESCO LP), a company engaged in the business of providing investment advisory services in securities, futures, and other financial instruments and interests.<sup>1</sup> Plasma Power also seeks a disclaimer of jurisdiction regarding certain arrangements and transactions related to DESCO LP's operations and interests. Specifically, Plasma Power seeks a disclaimer of jurisdiction regarding certain matters addressed in: (1) a proposed License Agreement pursuant to which DESCO LP would make available certain intellectual property interests to its wholly-owned subsidiary, D.E. Shaw & Co. Energy, L.L.C. (DESCO Energy),<sup>2</sup> and (2) a proposed Services Agreement, to the extent it addresses certain administrative support services that would be provided by DESCO LP.<sup>3</sup> Finally, Plasma Power seeks assurances that the disclaimers of jurisdiction previously issued by the Commission in Plasma Power I will continue to apply to the restructured arrangements described by Plasma Power in its petition.

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<sup>1</sup>As discussed below, a related order concerning the corporate structures giving rise to Plasma Power was issued by the Commission in D.E. Shaw Plasma Power, L.L.C., 102 FERC ¶ 61,275 (2003) (Plasma Power I). In Plasma Power I, we held that DESCO LP, under the then-proposed corporate structure, would be a public utility under Section 201(e) of the Federal Power Act (FPA), 16 U.S.C. § 824 (2000). See Plasma Power I, 102 FERC at P29. Plasma Power states that the revised corporate structures embodied in the instant filing are designed to retain DESCO LP's non-jurisdictional status.

<sup>2</sup>A draft License Agreement was filed accompanied by a request for privileged treatment by Plasma Power on July 1, 2003. See July 1 Filing at Attachment A.

<sup>3</sup>A draft Services Agreement was also filed accompanied by a request for privileged treatment by Plasma Power. See Petition at Exhibit C.

2. As discussed below, we will grant Plasma Power's request for a declaratory order. This order benefits customers by facilitating the entry of a new participant in the wholesale bulk power marketplace and thus promotes competition consistent with the Commission's goals and policies.

## **Background**

### **Plasma Power and its Affiliates**

3. Plasma Power states that its corporate organization and that of its affiliates, D.E. Shaw Plasma Trading, L.L.C. (Plasma Trading) and D.E. Shaw Plasma Portfolios, L.L.C. (Plasma Portfolios), are essentially unchanged from the description relied upon by the Commission in Plasma Power I.<sup>4</sup> As we noted in Plasma Power I, Plasma Power, upon its receipt of all necessary regulatory authorizations, will be a public utility under the FPA, engaged solely in power marketing activities, including the sale of electric energy, capacity, and certain ancillary services at wholesale.<sup>5</sup> Plasma Power's managing member and sole member would be Plasma Trading.

4. As we also noted in Plasma Power I, Plasma Trading, as the managing member of Plasma Power, would be authorized to direct, manage and control the day-to-day operations of Plasma Power, including any operations involving sales of power under Plasma Power's tariff.<sup>6</sup> Plasma Trading's managing member and sole member would be Plasma Portfolios, which would be comprised of a managing member, D.E. Shaw & Co., L.L.C. (DESCO LLC) and "regular members." DESCO LLC would be controlled, in turn, by its own managing member, D.E. Shaw & Co. II, Inc., whose chairman, president, and sole stockholder would be Dr. David E. Shaw.<sup>7</sup>

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<sup>4</sup>The duties and functions of Plasma Power's other affiliate, DESCO Energy, are discussed below.

<sup>5</sup>In a separate proceeding, filed in Docket No. ER03-882-000, Plasma Power has requested that it be granted market-based rate authority, subject to the approvals requested herein. The Commission will act by separate order on this filing.

<sup>6</sup>In a separate proceeding, filed in Docket No. ER03-879-000, Plasma Trading has requested that it be granted market-based rate authority, subject to the approvals requested herein. The Commission will act by separate order on this filing.

<sup>7</sup>In its petition in the Plasma Power I proceeding (and in its petition here), Plasma  
(continued...)

**DESCO Energy and DESCO LP**

5. Plasma Power states that in response to Plasma Power I, the duties and functions of DESCO LP have been restructured such that DESCO LP will remain non-jurisdictional, *i.e.*, that the investment advisory services which would have been provided by DESCO LP under Plasma Power's initial proposal addressed by the Commission in Plasma Power I would instead now be performed by a new affiliate, DESCO Energy, which will be a wholly-owned subsidiary of DESCO LP.

6. Plasma Power states that DESCO Energy would be established to provide investment advisory services to Plasma Power, pursuant to the terms of an investment advisory agreement (Investment Agreement), including advice regarding wholesale power trades.<sup>8</sup> Plasma Power states that DESCO Energy would also be authorized under the Investment Agreement to execute power trades as Plasma Power's agent and would operate as a public utility under the FPA.<sup>9</sup>

7. Plasma Power states that DESCO Energy would be staffed by employees provided by DESCO LP, pursuant to the Services Agreement, but dedicated to and engaged exclusively on behalf of DESCO Energy. In addition, Plasma Power states that DESCO LP may establish policies applicable to DESCO Energy and may provide high-level oversight, but that decisional control over recommendations regarding individual FPA

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<sup>7</sup>(...continued)

Power clarifies that Plasma Portfolio's regular members would be passive investors that do not have control over Plasma Portfolios or Plasma Power. Plasma Power also makes clear that Plasma Portfolios may in the future have additional subsidiaries, but that no such subsidiary other than Plasma Power or possibly Plasma Trading would trade physical power in interstate commerce at wholesale or own or operate facilities subject to the Commission's jurisdiction. Plasma Power also notes that the rights and responsibilities as between Plasma Portfolios and its managing member, DESCO LLC, would be governed by the terms of a limited liability company agreement, as previously filed in the Plasma Power I proceeding.

<sup>8</sup>A draft Investment Agreement was filed accompanied by a request for confidential treatment by Plasma Power. See Petition at Exhibit B.

<sup>9</sup>In a separate filing made by DESCO Energy in Docket No. ER03-880-000, DESCO Energy is seeking market-based rate authority, subject to the approvals requested herein. The Commission will act by separate order on this filing.

jurisdictional transactions and the execution of individual FPA jurisdictional transactions would be the sole responsibility of DESCO Energy.

8. Plasma Power further states that under the Services Agreement, DESCO LP would provide DESCO Energy with non-FPA jurisdictional administrative support services such as payroll, accounting, legal, compliance, documentation support, human resources, and other administrative services. Plasma Power notes that under the Services Agreement, DESCO LP may also provide DESCO Energy with administrative support equipment and materials such as office space, desks, computers, and office supplies.

9. Plasma Power states that under the Services Agreement, DESCO Energy would also be authorized to engage in non-FPA jurisdictional activities by advising DESCO LP and executing trades on behalf of entities advised by DESCO LP relating to securities (except purchases of Public Utility Securities), future contracts, other financial or financing transactions (such as swaps or options), and (where not subject to the FPA) other investment or property transactions engaged in by DESCO LP as an investment advisor.

10. Plasma Power further states that DESCO LP and its affiliates (other than DESCO Energy, Plasma Power, and Plasma Trading) own certain intellectual property consisting of computer software, algorithms, trade secrets, and other intellectual property, which would be the subject of the Licensing Agreement to be executed between DESCO LP and DESCO Energy. Pursuant to the Licensing Agreement, DESCO LP would license all or a portion of DESCO LP's intellectual property to DESCO Energy to be used in connection with DESCO Energy's business. Plasma Power states that the License Agreement would not permit DESCO Energy to make a market in physical power trades or match bids and offers in physical power transaction between Plasma Power and other market participants. Plasma Power clarifies that the intellectual property made available to DESCO Energy under the Licensing Agreement would generally involve quantitative methods that would primarily serve to inform DESCO Energy's trading strategies and would be used by DESCO Energy to analyze the profitability of potential trades.

11. Plasma Power asserts that under the circumstances outlined in its petition, the disclaimers of jurisdiction set forth by the Commission in Plasma Power I would continue to apply. In addition, Plasma Power asserts that DESCO LP would not operate as a public utility and that the License Agreement would be non-jurisdictional. Finally, Plasma Power asserts that the advisory services provided by DESCO Energy to DESCO LP would similarly be non-jurisdictional.

**Notice of Filing and Responsive Pleadings**

12. Notice of Plasma Power's petition was published in the Federal Register,<sup>10</sup> with interventions, comments or protests due on or before June 20, 2003. No responsive pleadings were filed. On July 1, 2003, Plasma Power filed the License Agreement referenced in its petition. Notice of Plasma Power's filing was published in the Federal Register,<sup>11</sup> with interventions, comments or protests due on or before July 14, 2003. No responsive pleadings were filed.

**Discussion**

13. Section 201(e) of the FPA defines "public utility" as any person who owns or operates facilities subject to the jurisdiction of the Commission. Under Section 201(b)(1), jurisdictional facilities are facilities used in the transmission or sale for resale of electric energy in interstate commerce. Applying these standards here, we agree, for the reasons discussed below, that DESCO LP would not be a public utility under the FPA under the intra-corporate organization outlined by Plasma Power in its petition. In addition, we find that the License Agreement, as proposed, need not be filed under Section 205(c) of the FPA. We further find that while DESCO Energy would operate as a public utility under the FPA, the advisory services provided by DESCO Energy to DESCO LP under the Services Agreement would not be subject to Commission jurisdiction under the FPA. Finally, we find for the reasons discussed below that our disclaimers of jurisdiction set forth in Plasma Power I continue to apply to the intra-corporate structures and arrangements outlined by Plasma Power in its petition.

**Plasma Power I**

14. Plasma Power requests a finding that the disclaimers of jurisdiction issued by the Commission in Plasma Power I, specifically in Paragraphs 15, 19, 20, and 23 of that order, continue to apply to the restructured arrangements and transactions outlined by Plasma Power in its petition. In Plasma Power I, we disclaimed jurisdiction over the passive investors in Plasma Portfolios, the entity that owned the downstream public utilities, Plasma Trading and Plasma Power.<sup>12</sup> We also disclaimed jurisdiction over the

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<sup>10</sup>68 Fed. Reg. 33,927 (2003).

<sup>11</sup>Id. at 41,332.

<sup>12</sup>Plasma Power I, 102 FERC at P15.

changes in ownership or control of interests in the passive investors.<sup>13</sup> In addition, we found that, except for Plasma Trading, the upstream, non-passive owners of Plasma Power are not public utilities under the FPA, although changes in control of the upstream, non-passive owners would require Section 203(a) approval.<sup>14</sup>

15. Plasma Power states that the ownership, control and operational structure of Plasma Power and its upstream owners is substantially the same as that portrayed in Plasma Power I, except for the role of DESCO Energy (which is discussed below). We agree and therefore find, as requested, that the disclaimers of jurisdiction set forth in Plasma Power I at Paragraphs 15, 19, 20 and 23 apply to the transactions and arrangements outlined by Plasma Power in its petition.

### **DESCO LP**

16. Plasma Power asserts that under the revised organizational structure proposed in its petition, DESCO Energy, not DESCO LP, would be the entity that would provide investment advisory and other services to Plasma Power (under the Investment Agreement), and that as such, DESCO LP would not be a public utility under the FPA. Plasma Power further asserts that DESCO LP's actions under the License Agreement and the Services Agreement, would not make it a public utility. Plasma Power asserts, in this regard, that the License Agreement, in and of itself, will not establish, modify, or terminate the terms of jurisdictional contracts or otherwise create binding legal obligations subject to the Commission's jurisdiction. Moreover, under the Services Agreement, Plasma Power argues that DESCO LP would provide to DESCO Energy certain limited support services, equipment and material unrelated to the decisional control over DESCO Energy's execution of FPA-jurisdictional transactions or other FPA-jurisdictional activities.

17. We find that DESCO LP is not a public utility under the circumstances outlined by Plasma Power in its petition. Neither DESCO LP's ownership of DESCO Energy, nor the services it would provide under the License Agreement, nor its provision of services under the Services Agreement, provide a basis upon which DESCO LP should be

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<sup>13</sup>Id. at P19-P20.

<sup>14</sup>Id. at P23. Section 203 of the FPA provides that a public utility shall not sell, lease, or otherwise dispose of the whole or part of its facilities subject to the jurisdiction of the Commission of a value in excess of \$50,000, or purchase, acquire, or take any security of any other public utility, without the Commission's prior approval. See 16 U.S.C. § 824c (2000).

considered a public utility. While the Commission's regulation of an entity as a public utility is premised on that entity's ownership and/or operation of jurisdictional facilities, the fact that an entity owns all or a controlling interest of the voting stock of a public utility does not itself confer public utility status upon that entity.<sup>15</sup> For example, the Commission has historically declined to classify public utility holding companies as public utilities for the purpose of exercising jurisdiction over holding companies.<sup>16</sup>

18. Under the License Agreement, DESCO Energy would be permitted to use certain intellectual property interests made available by DESCO LP for the purpose of developing trading advice for FPA jurisdictional activities. DESCO Energy, however, not DESCO LP, would have the decisional authority regarding the actual use of these intellectual property interests. As such, the License Agreement would not establish, modify or terminate the terms of any jurisdictional contracts to which DESCO Energy may become a party or otherwise create binding legal obligations subject to the Commission's jurisdiction. Under these circumstances, we find that the License Agreement need not be filed under Section 205(c) of the FPA.<sup>17</sup>

19. Moreover, while we are aware that under the Services Agreement, DESCO LP will have the authority to hire, fire and review the performance of DESCO Energy's employees and that DESCO LP may from time to time establish policies applicable to DESCO Energy, DESCO LP will not have decisional day-to-day control with respect to individual jurisdictional transactions entered into by DESCO Energy. Rather, DESCO Energy would retain sole authority and responsibility over its pursuit or involvement in these jurisdictional activities. In addition, while the support services provided by DESCO LP under the Services Agreement may be necessary or a complement to the performance of DESCO Energy's jurisdictional activities, these services appear to be of a routine nature coincident to or necessary to the conduct of normal business activities. Similar to our finding regarding the services or activities encompassed under the License Agreement, we find that the Service Agreement need not be filed under Section 205(c) of the FPA.

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<sup>15</sup>See *Missouri Basin Municipal Power Agency v. Midwest Energy Company and Iowa Resources, Inc.*, 53 FERC ¶ 61,368 at 62,298 (1990), reh'g denied, 55 FERC ¶ 61,464 (1991).

<sup>16</sup>53 FERC at 62,298.

<sup>17</sup>See *Public Service Company of Colorado*, 67 FERC ¶ 61,371 (1994), and *Resale Power Group of Iowa, Inc.*, 85 FERC ¶ 61,424 (1997).

20. Although we find that DESCO LP's role as owner of a public utility and its provision of services under the Services Agreement do not result in DESCO LP becoming a public utility, transactions resulting in a change in control of DESCO LP would result in a change of control of DESCO Energy and the jurisdictional facilities it operates. Accordingly, such transactions would effect a disposition of jurisdictional facilities and would require the Commission's pre-approval under Section 203(a) of the FPA.<sup>18</sup>

**Advisory Services Provided by DESCO Energy**

21. We will also disclaim jurisdiction over DESCO Energy's provision of advisory services under the Services Agreement, involving non-FPA wholesale electric trading and securities-related matters and other non-FPA related transactions, to DESCO LP. None of the activities encompassed within the provision of these services involve the actual purchase of public utility securities (jurisdictional under Section 203 of the FPA) or sales of wholesale power in interstate commerce (jurisdictional under Section 205 of the FPA).

22. Plasma Power states that a purchase of public utility securities by a non-public utility, i.e., by DESCO LP, Plasma Portfolios or other affiliates that are not public utilities, would not be an acquisition subject to our Section 203 jurisdiction.<sup>19</sup> The Commission clarifies that where the acquisition of public utility securities would result in a change of control of a public utility and its jurisdictional facilities, prior approval under Section 203(a) will be required.

**The Commission orders:**

Petitioner's request for a declaratory order disclaiming jurisdiction is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>18</sup>See, e.g., Enova Corporation and Pacific Enterprises, 79 FERC ¶ 61,107 at 61,494-496 (1997), and Morgan Stanley Capital Group Inc., 79 FERC ¶ 61,109 at 61,504 (1997).

<sup>19</sup>See Petition at pp. 22-23.